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CHICAGO, ILLINOIS

June 22, 1993

VIA HAND DELIVERY

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Stop Code 1170
Room 222
Washington, D.C. 20554

Re: MM Dkt. No. 92-259, In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 (Broadcast Signal Carriage Issues)

Dear Ms. Searcy:

Enclosed herewith for filing in the referenced proceeding are the original and eleven (11) copies of the Consolidated Reply to Oppositions to Petition for Reconsideration of A.C. Nielsen Company. Also enclosed herewith is a completed Record Image Processing System form to accompany the filing.

Please direct any questions regarding the enclosed Reply to the undersigned.

Respectfully submitted,

Kevin S. DiLallo

Kevin S. DiLallo

Enclosures

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ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television	)	
Consumer Protection and Competition	)	MM Docket No. 92-259
Act of 1992	)	
	)	
Broadcast Signal Carriage Issues	)	

To: The Commission

CONSOLIDATED REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

A.C. Nielsen Company ("Nielsen"), by its attorneys, hereby replies to the Oppositions to Nielsen's Petition for Reconsideration ("Petition") in this docket which were filed by the National Cable Television Association ("NCTA") and Time Warner Entertainment, L.P. ("Time Warner"). For the reasons set forth below and in Nielsen's Petition, Nielsen's Petition should be granted.

A. The *WGN* Definition of "Program Related" is Inconsistent with the Expressions of Congressional Intent Cited by NCTA and Time Warner

NCTA promotes use of the *WGN*[1/] definition of "program-related" material for purposes of the Cable Act's must-carry requirements by referring to Congress's stated intent that "program-related" material include

> integral matter such as subtitles for hearing-impaired viewers and simultaneous translations into another language [and not] tangentially-

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1/ *WGN Continental Broadcasting v. United Video*, 693 F.2d 622 (7th Cir. 1982) ("*WGN*").

> related matter such as [a] reading list shown during a documentary or the scores of games other than the one being telecast or other information about the sport or particular players.

NCTA Opposition at 6 (quoting Report of the House Energy and Commerce Committee accompanying H.R. 4850, H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992) ("House Report") at 101). NCTA fails even to try to demonstrate how the *WGN* definition of "program-related" material is consistent, or how Nielsen's proposed definition of "program related"[2/] is inconsistent, with this expression of Congressional intent. Upon examination, it is clear that the *WGN* definition of "program-related material" is in fact *in*consistent with Congressional intent.

In *WGN*, the Court of Appeals held that copyright protection that is applicable to a broadcast station's main-channel programming also would protect material carried concurrently on a station's Vertical Blanking Interval ("VBI") if the material were part of the same audiovisual work, *i.e.*,, if it were intended to "be seen by the same viewers as are watching the [main-channel programming], during the same interval of time . . . , and as an integral part of [such programming]." 693 F.2d at 626. This test is very different from that suggested by Congress in the legislative history of the Cable Act, which requires only that "program-related material" be integrally related to main-channel programming, House Report, *supra*, at 101, not that it be "viewed" or "intended to be viewed" by the same audience. Indeed, reliance upon the *WGN* test in

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[2/] In its Petition, Nielsen proposed adoption of a test already used by the Commission in connection with proposals to use the VBI, *i.e.*, signals, specifically including SID and other program identification codes, for which there is a "direct correlation of the signal with the [main-channel programming] that is being broadcast at the same time." *Permitting Transmission of Program-Related Signals in the Vertical Blanking Interval of the Standard Television Signal*, 43 Fed. Reg. 49331, 49333 (Oct. 23, 1978); *see* Petition at 22.

the Cable Act context would seem to allow deletion of the exact services that Congress cited as examples of material that *would be* sufficiently "related" to main-channel programming to warrant must-carry protection.

For example, the captioning for hearing impaired members of the audience and the foreign language translations referred to by Congress in the House Report would not seem to satisfy the *WGN* test for "relatedness" because they are neither part of the same audiovisual work, nor intended to be viewed by the same audience as the main-channel programming.[3/] Rather, each is intended only for viewing by a certain (and probably relatively small) segment of the audience. Conversely, as noted in Nielsen's Petition, adoption of the *WGN* test might actually *require* the carriage of material -- such as the program schedule and news stories addressed in the *WGN* decision -- which otherwise would not appear to be integrally related to the main-channel programming, as required by the statement of Congressional intent cited by NCTA. These results, which would follow from application of the *WGN* test in the cable context would be directly contrary to stated Congressional intent and therefore it is not logical to conclude that Congress intended the *WGN* test to apply when making determinations whether VBI programming is sufficiently "related" to main-channel programming to deserve must-carry protection.

[3/] Such services generally are not created by broadcast licensees, although they are distributed by them. This fact undercuts NCTA's attempt to find support for use of the *WGN* test in the language of the House Report which stated that the must-carry requirement is not intended "to be used to require carriage of secondary uses of the . . . vertical blanking interval for the creation or distribution of material by persons or entities other than the broadcast licensee," House Report at 93. *See* NCTA Opposition at 6.

Of course, there are many other uses of the VBI that also are not intended to be seen by the audience of the main-channel programming, but which clearly are integrally related to such programming. Nielsen's SID codes are just one example. Cue signals, which are used by local broadcast stations and cable systems alike for a variety of purposes (including local ad insertions) are another. As Nielsen argued in its Petition, it is difficult to conceive of a use of the VBI which is more integrally related to the main-channel programming than Nielsen's codes or other data which *identify* the program, and upon which broadcast licensees rely as the foundation for the advertiser-supported free broadcasting system.[4/] The mere fact that program identification codes or cue signals are not intended to be seen by the audience, while perhaps relevant in the copyright context, is irrelevant in the must-carry context, where the primary inquiry is whether the codes are integrally related to the main-channel programming. Although these codes are not seen, they are integrally related to the main-channel programming, and therefore satisfy Congressional intent as expressed in the House Report.[5/]

[4/] Time Warner's unsupported and conclusory statement that Nielsen's SID codes are "not intended to be an integral part of the program presented," Time Warner Opposition at 3, is factually incorrect, as demonstrated above.

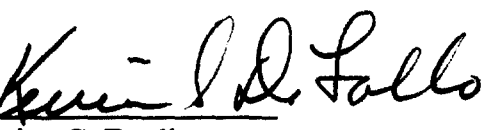
[5/] Time Warner's Opposition begs the relevant question by arguing that Nielsen's SID codes are not "program related" because they are not intended to be seen by the audience. Time Warner Opposition at 3 & note 3. As Nielsen has shown, and Congress has indicated, the "audience visibility" test is not appropriate in the must-carry context.

nonetheless were specifically acknowledged by Congress to be sufficiently "related" to main-channel programming to deserve must-carry protection. House Report at 101. NCTA's insistence on use of the *WGN* test thus is contrary to Congressional intent.[7/]

For the foregoing reasons, A.C. Nielsen Company respectfully requests that the Commission grant its Petition for Reconsideration and reconsider its *Order* in this proceeding as described in Nielsen's Petition.

Respectfully submitted,

A.C. NIELSEN COMPANY

By: 

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June 22, 1993

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7/ It was exactly to avoid issues such as those noted in this Reply that Congress in revising the Copyright Law in 1976 cautioned the FCC

> and others who make determinations concerning communications policy, not to rely upon any action of this Committee as a basis for any significant changes in the delicate balance of regulation in areas where the Congress has not resolved the issue. Specifically, we would urge the [FCC] to understand that it was not the intent of this bill to touch on issues such as pay cable regulation or increased use of imported distant signals. These matters are ones of communications policy and should be left to the appropriate committees in the Congress for resolution.

H.R. Rep. No. 1476, 94th Cong., 2d Sess (1976) at 89.

CERTIFICATE OF SERVICE

I, Aixa Lasso-Diaz, a secretary in the law firm of Gardner, Carton & Douglas, hereby certify that copies of the foregoing **"Consolidated Reply to Oppositions to Petition for Reconsideration"**, have been mailed by first-class United States mail, postage-prepaid, on this 22nd day of June, 1993, to the foregoing parties of record:

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